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ABSTRACT

This paper was part of a symposium examining, from a multiple perspective, the lessons to be learned from the past decade of school finance reform and outlines a research and political agenda for state and federal activity in the 1980s. The issues that school finance litigation has addressed during the 1970s are reviewed, the current cases and their relationship to the school finance movement of the 1970s are examined, and future directions for school finance litigation in the 1980s are discussed. (Author/MLF)

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THE FUTURE DIRECTION OF SCHOOL FINANCE LITIGATION: CONSTRAINED OPTIMISM

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THE FUTURE DIRECTION OF SCHOOL FINANCE
LITIGATION: Constrained Optimism

Litigation which seeks the reform of state systems of elementary and secondary school finance has been actively pursued through the 1970's. The impetus for much of this legal activity arose from the decision of the California Supreme Court in Serrano v. Priest.[1/] The California Court held in 1971 that a school finance system which made the quality of a child's education a "function of the wealth of his parents and neighbors" violated the equal protection provisions of the United States and California Constitutions. Following Serrano many cases were filed challenging school finance statutes in other states. However, the 1973 U.S. Supreme Court decision in San Antonio Independent School District v. Rodriguez which ruled that wealth-based inequalities in expenditures did not violate the federal equal protection clause, closed the doors of the federal courts to school finance suits. Since Rodriguez school finance litigation has continued at an accelerating pace in state courts.

The state cases initiated since Rodriguez have raised a number of issues concerning the financing of public education. Plaintiffs in Idaho, Connecticut, Oregon, and Washington, as in California, challenged expenditure disparities which resulted from school district property wealth. Other cases such as those in New Jersey, New York, Ohio, and a second case in Washington have challenged other inequities and inadequacies of state systems of school finance: in New Jersey the failure of the legislature

to define and finance the "thorough and efficient" education mandated by the New Jersey Constitution; in Washington and Ohio the overdelegation of the state's responsibility to provide and finance a "basic" education and a "thorough and efficient" education to the whim and caprice of local voters; in New York the failure of the school finance system to take into account the special problems of the state's largest urban centers, e.g., high concentrations of low-income, high-need children, municipal overburden, and the higher cost of educational services.

The results of these efforts to reform school finance through litigation have been mixed. Cases decided shortly after Rodriguez by state supreme courts in Idaho, Washington, Oregon, and Arizona tended to follow the United States Supreme Court, eschewing an independent analysis under their state constitutions. More recently, state courts have asserted their independence from the strictures of the Rodriguez decision and increasingly have found school finance systems wanting under the equal protection and education provisions of state constitutions. Recent decisions by the supreme courts in California and Connecticut and by trial courts in Washington and Ohio suggest that the prospects of school finance litigation are considerably better than they were in the period immediately following Rodriguez. Although the prospects of future litigation will clearly vary from state to state, we look to the future with "constrained optimism".

This paper has two major sections. The first reviews the issues which school finance litigation has addressed during the 1970's through an examination of the most important cases which

were decided or which are presently active. The second discusses future directions for school finance litigation in the coming decade.

SCHOOL FINANCE CASES OF THE 1970's

Challenges to Wealth-Based Disparities in Educational Expenditures

In most states, the structure of school finance has produced great inequalities in educational expenditures among school districts. The cause of these inequalities is the widely unequal distribution of property wealth. In some states property wealth differences of ten to one or 100 to one between the highest and lowest wealth districts are not unusual. The result has been that districts with high property wealth have been able to spend large amounts on education at low tax rates, while low wealth districts have been forced to accept less than average expenditures, even with higher than average tax rates. Furthermore, these expenditure differences are wholly unrelated to pupil needs, educational costs or a community's educational aspirations.

Most state aid systems tend to ameliorate the effects of district wealth on expenditures by distributing some funds to school districts in inverse proportion to district wealth. However, state "equalization" aid frequently has little effect on wealth based inequalities. Equalizing aspects of state formulas are often undermined by other state aid provisions such as flat grants, minimum aid and hold-harmless requirements which provide more aid to wealthy than to poor districts. State aid is frequently so small a share of total state-local educational

expenditures that it has little effect on expenditure disparities among districts.

The California Supreme Court in 1971 was the first court to recognize that expenditure inequalities resulting from disparities in taxable wealth among school districts were unconstitutional. Following Serrano over 30 cases were filed in other states challenging discriminatory school finance systems. These were about equally divided between those which, like Serrano, were filed in state courts, and those brought in federal courts. The first to reach the United States Supreme Court came from a three-judge federal court in Texas which had held the Texas system of financing elementary and secondary education to be in violation of the equal protection clause of the 14th Amendment to the United States Constitution because it discriminated on the basis of school district wealth. On appeal, the United States Supreme Court reversed in San Antonio Independent School District v. Rodriguez.[2/]

Justice Powell's opinion for the five-member majority in Rodriguez made it clear that the federal courts were not to be the vehicles for reforming state school finance systems which contained wealth-based expenditure disparities. This resulted from the Court's conclusions that education is not a fundamental interest under the U.S. Constitution because education is not a right "explicitly or implicitly" guaranteed by the Constitution, and that school district wealth is not a "suspect" classification for purposes of constituional analysis. These legal conclusions meant that the State of Texas only needed to justify its

discrimination by showing that its system of educational finance was minimally rational.[3/] Rodriguez thus returned litigation challenging school finance inequities to state courts where it had begun in Serrano.

Those who viewed state courts as but dim shadows of their federal counterparts believed that Rodriguez put an end to these challenges. The pessimists, however, underestimated the intelligence and vigor of state judiciaries and the significant differences between the position of education in the United States Constitution and in state constitutions. Other than a predisposition to follow the result in Rodriguez, there is no legal reason why a state court need feel bound by the United States Supreme Court's decision. The state's role in public education is far more encompassing than the federal government's, both in fact and law. The provision of free public elementary and secondary education is almost uniformly considered a state function, irrespective of the fact that many citizens would like to consider their particular public school or school district a local preserve. Virtually all state constitutions require the state to provide a system of free public schools, and many establish standards for these systems, for example, "thorough", "uniform", "general", "efficient", or "adequate". The bulk of the funds for elementary and secondary education are provided from state revenues and local tax revenues available for public education by virtue of state law. The way is open, consequently, for a state court to conclude that the state has a far greater responsibility for insuring that its educational system is funded in a nondiscrimi-

natory manner than does the federal government under the United States Constitution.

Since education is a right "explicitly or implicitly" guaranteed by state constitutions, a state court, applying the same legal analysis as the Supreme Court in Rodriguez, should conclude that education is a fundamental interest under the state constitution. Consequently a state court should apply a higher standard of judicial scrutiny to wealth-discrimination suits brought under state equal protection provisions, requiring a state to bear a heavy burden of justifying expenditure disparities which several courts have found to have no rational basis.

For several years following Rodriguez plaintiffs in state court cases challenging property-wealth-based expenditure disparities lost more ground than they gained. Decisions by the supreme courts in Idaho, Washington and Oregon refused to declare unconstitutional finance systems that discriminated against children in low-wealth school districts.[4/] However, the Washington and Idaho decisions were only affirmed by a narrow majority and contained strong dissenting opinions. On the other hand a trial court in Serrano v. Priest found the California school finance system unconstitutional on the basis of Serrano I, unaided by the federal constitution.[5/] A Connecticut trial court similarly ruled the Connecticut school finance system unconstitutional because it made educational expenditures a function of the taxable wealth of school districts.[6/]

The first major test of the prospects of school finance litigation came however when the California Supreme Court reviewed

the trial court's findings in Serrano that the California system was unconstitutional. The 1971 opinion by the California Supreme Court in Serrano had relied heavily on the federal constitution. Rodriguez eliminated this ground and it remained to be seen whether the California Supreme Court would rest its original declaration solely on the equal protection requirements of the California Constitution. The California Supreme Court in its 1976 decision in Serrano II did reaffirm Serrano I under state equal protection law and sustained the judgment of the trial court which had held expenditure inequalities produced by differences in school district property wealth to be unconstitutional.[7/] And, since Serrano II, other state courts have made similar rulings.

The Connecticut Supreme Court's decision in Horton v. Meskill which followed Serrano II by four months held the Connecticut school finance system unconstitutional because it too discriminated on the basis of district wealth.[8/] The Connecticut court found education to be a fundamental interest under the state constitution and held that the state equal protection provision had been violated. The court also held that legislation delegating the state's duty to fund education to local school districts was not "appropriate legislation" under the constitutional requirement that the state provide a substantially equal educational opportunity to its youth. A state trial court in Ohio also held later in 1977 that the Ohio system of financing education was unconstitutional because, among other things, it made the quality of education a function of the property wealth of school districts.[9/]

Thus, beginning with Serrano II in December 1976, the fortunes of plaintiffs challenging financing systems that discriminate against children in low-wealth districts have substantially improved. However, wealth-based expenditure disparity is not the only ground on which schoool finance litigation has been brought in recent years.

Other Challenges to Inequities in School Finance Systems

In recent years plaintiffs in many states have challenged inequities which Serrano does not directly address. Serrano, for example, does not necessarily require expenditure equality. So long as fiscal capacities of school districts are equalized, districts can choose to levy different tax rates producing different expenditures per pupil. Serrano does not require the elimination of inequalities in educational opportunities resulting from the exercise of local fiscal control, i.e., from differences in the abilities or willingness of districts or voters to tax themselves for education. Nor does Serrano require higher expenditures in districts with higher educational costs or the provision of more intensive levels of educational services for children with special educational needs, e.g., handicapped or educationally disadvantaged children. Of course, nothing in the Serrano precedent prevents a state from dealing rationally with educational inequalities stemming from such causes, but it does not compel a state to address these issues. In this regard, the Serrano doctrine is not and was never intended to be a panacea for every inequality plaguing school finance systems. Its focus is

one particular cause of inequality in educational expenditures, namely, differences in local taxable wealth - which is the dominant cause of expenditure disparity in many states.

Robinson v. Cahill was the prototype for challenges to inequalities not addressed by Serrano.[10/] The suit was brought on behalf of urban school districts who were poor in property wealth per pupil, below average in educational expenditures, and served high concentrations of urban poor and minority children whose educational achievement was well below state norms. Plaintiffs challenged the New Jersey school finance statute on grounds that it failed to provide the "thorough and efficient" education which was mandated by the New Jersey Constitution.

The court's ruling in the Robinson case, which overturned the New Jersey school finance system, made it clear that a constitutional system not only had to provide "an equal educational opportunity for children" (measured by expenditures per pupil), but also had to ensure that every child receives a "thorough and efficient" education. This meant that once a constitutionally mandated level of education had been determined[11/] the state could either provide the necessary funds from state sources or compel school districts to raise sufficient revenues. Neither an inadequate tax effort nor an inadequate tax base could justify the failure of school districts to provide a "thorough and efficient" education. Robinson thus provides the doctrinal foundation for challenging (a) the disinclination or disability of school districts or voters to fund an adequate level of education and (b) educational deficiencies resulting from low expenditures, high costs or con-

centrations of children requiring more intensive educational services.

Subsequent to the 1973 Robinson decision, suits seeking the elimination of these problems were filed in other states - usually on behalf of children in central city districts, and other state courts have held the state responsible for educational deficiencies resulting from the failure of local taxpayers to approve referenda for current operating expenditures needed to provide an adequate level of educational services. In January, 1977 a state trial court in Seattle School District No. 1 v. Washington ruled the Washington educational finance system unconstitutional because it failed to insure sufficient funding for all children to receive a basic program of education. The court found that the state could not fulfill its "paramount duty" to make ample provision for the education of all children", as required by the state constitution, by simply delegating this responsibility to local voters who had no legal obligation to provide funds for the education of children. To fulfill its obligation the state had to either fund this basic program of education directly or provide a dependable and regular tax source for utilization by school districts.[12/] A trial court in Ohio also held the Ohio school finance system unconstitutional because, among other things, it delegated a substantial portion of the state's educational obligation to provide a "thorough and efficient" system of education to the whim and caprice of local voters.[13/] The court held that the state's role in the financing of education must be primary and dominant and that variations in local tax efforts among

districts may result in differences in educational offerings only above the level of a general education of high quality.

The courts in both Washington and Ohio cases have thus condemned financing systems under which local voters have the option of not providing a "basic program of education" or a "general education of high quality". In both of these cases, as well as in Robinson, the courts have indicated that the constitution requires more than minimal educational opportunities. The decision in the Cincinnati case also addresses the higher educational costs in certain school districts and the greater educational needs of certain children. The Ohio court held that a constitutional system of financing education must "be addressed to a realistic appraisal of educational needs and educational costs" and must "compensate urban districts adequately for their special costs."

Cost and need issues have also been raised in Board of Education, Levittown v. Nyquist, awaiting decision in a New York trial court. There plaintiffs from three large cities claim that the school finance formula arbitrarily and inadequately measures local fiscal capacity to support education.[14/] By using a measure of property wealth per pupil, the plaintiff cities claim they appear wealthy when in fact they are poor since they must finance high levels of noneducational services out of their local tax bases. They also claim that educational costs are higher in those districts because the high concentrations of low-income, low-achieving children require more extensive and more costly educational services.

The school finance cases decided by state courts since

Rodriguez show that Rodriguez, far from signaling the end of suits challenging inequitable systems of financing schools, produced a flowering of state court jurisprudence under which the equal protection and education provisions of state constitutions have been interpreted to prohibit the state from providing an inadequate or discriminatory educational system. Most of the decisions in favor of plaintiffs have not been by courts known to be particularly "activist" or "liberal". Rather, the decisions point to the fact that the causes of fiscal inequalities and inadequacies in state educational financing systems are sufficiently glaring and irrational to be found unconstitutional by judges whose only predisposition to the facts is an open mind. This trend is likely to continue to the extent that state legislatures allow the conditions giving rise to this litigation to persist.

FUTURE DIRECTIONS OF SCHOOL FINANCE LITIGATION

As the preceding discussion suggests, a number of critical school finance issues have been raised by cases which were initiated or decided during the late 1970's. Some of these issues will remain as central concerns of public school finance during the 1980's. Other issues which have recently begun to emerge will also be the subject of concern - and of possible litigation - over the course of the next decade. This section takes up each of these sets of issues in turn.

Fiscal Neutrality v. Expenditure Equality

Challenges to district power equalizing (D.P.E.) formulas, begun in Cincinnati v. Walter, will likely continue during the 1980's in states in which D.P.E. systems do not adequately fulfill

state responsibilities to provide a "thorough and efficient" education for all children because local voters or school districts will not make sufficient tax effort to do so. Empirical research in Ohio,[15/] Illinois[16/] and other states[17/] identifies a number of factors which limit the effectiveness of D.P.E. formulas in achieving greater school finance equity. One of these center around the issue of tax effort for schools.

Research in Ohio has shown that there is a strong positive relationship between family income and school tax rates. School districts with lower median family income consistently have lower tax rates than high income districts. Consequently they generate little local revenue and less state revenue since state aid is strongly tied to school tax rates. The problem is further compounded by the fact that many districts which are poorest in income also tend to be poorest in property wealth. Low-wealth and low effort combined result in educational programs which often do not comply with even minimum state educational standards.

A second factor centers around the competing demands on the property tax base for noneducational services, commonly referred to a "municipal overburden". Because of the need to provide higher levels of police and fire protection, sanitation service, health care, and in some states a high share of welfare costs, large cities which have high total tax rates can devote a smaller share of tax revenues to education; also, local voters are unwilling to support additional taxes for education since total tax burdens are already quite high. The result is lower state aid and a reduction in the level and quality of educational services

in these large urban centers.

In states in which expenditure disparities among school districts do not decrease when D.P.E. formulas are employed, these disparities will be the subject of litigation in the coming decade.

Impact of School Finance on Large Cities

The finance of public education in large cities will also continue to be a major concern during the 1980's. The problems of large urban areas have been well-documented over the past two decades. The out-migration of higher-income, better-educated people and manufacturing and retail sales to the suburbs - and more recently to the states in the Sunbelt - coupled with the in-migration of a low-income, heavily minority population with a high need for public services, have placed financial burdens on older urban centers which are beyond their capacities to shoulder. The large urban intervenors in the Levittown v. Nyquist case in New York have categorized the problems of large cities like New York, Rochester, Buffalo and Syracuse in terms of municipal overburden - described perviously for Cincinnati - and educational overburden. The latter focuses on the high concentrations of high-need students in the cities and the higher cost of providing educational services in these areas. Cities have to spend more per pupil than rural or suburban districts to provide a comparable educational program.

Most systems of state finance, however, continue to have an anti-urban bias. State aid formulas continue to measure fiscal capability solely on the basis of property wealth per pupil.

Cities thus appear wealthy when compared with state average property wealth per pupil. In contrast, cities appear considerably poorer when other measures of wealth such as family income or property wealth per capita are used as standards of fiscal capacity. Only a few states consider these alternatives measures of wealth for distributing state aid.

As the older cities of the Northeast and Midwest continue to decline economically - and as older suburban jurisdictions in these areas and cities in other areas of the country take on the characteristics of these declining urban areas - the problems of financing education in urban areas will increasingly become a central issue in school finance litigation.

Finance of Minority School Districts in Southern States

For many years, the primary focus of school finance reform has been on the economically heterogeneous states of the North and West where the wide range in fiscal capacity among school districts has created the most dramatic expenditure disparities. The states of the South, many of which continue to finance their schools through programs developed during the 1920's and 1930's, have largely been ignored, even though their levels of educational expenditures and resources are among the lowest in the nation.

The tremendous economic development of the South - and projected economic growth over the next decade - has eliminated the rationale, i.e., economic underdevelopment, for not addressing long-standing problems of school finance equity. Moreover this growth is likely to bring new problems. Differential economic grown within Southern states may exacerbate educational inequalities by

increasing the range of fiscal capacity among localities and will thus contribute to an increase in expenditure disparities among school districts.

The problem of economic development in the South, is further compounded by the problem of race. In states such as South Carolina and Mississippi, economic growth has been heavily concentrated in the predominantly white areas of the state, e.g., the Northeast corner of Mississippi and the Piedmont area of South Carolina. Thus the problems of wealth-based inequalities will increasingly have racial overtones. This means that other race-based school finance problems in the South, which are already significant, will become increasingly important over the next decade. The problem of "underfunding" in majority-black South Carolina school districts after desegregation has already been well documented.[18/] White fiscal authorities in many predominantly-black districts have reduced or maintained inordinately low tax effort, thus providing the lowest levels of public school support in the state. The problem of disparity of educational expenditures between racial groups in segregated school districts has also been the subject of investigation in states such as Louisiana.[19/] Black children in some parishes may be receiving fewer local revenues than white children in the same parish. Both of these problems may be the subject of litigation - possibly on federal constitutional grounds - during the coming decade.

Categorical Aid v. Equalization

One of the most important developments in school finance at the state level during the 1970's was the introduction of large-scale categorical programs to provide additional resources for

students with special education problems and needs. In fact the largest percentage increases in state aid have occurred in state special education programs. Many states have also enacted compensatory education programs for economically disadvantaged students and bilingual programs for students whose primary language is not English.

As the proportion of categorical aid has risen relative to equalization aid, the distribution of categorical funds has taken on increasing importance. Wilken's[20/] study of special education funding in Massachusetts and Georgia suggests that disproportionate amounts of these funds tend to flow to high property-wealth, high-income suburbs, which have the resources to identify and provide programs for special need children, and which are adept at the grantsmanship required to obtain state and federal funding. The whole set of relationships between school district wealth, categorical aid, and equalization aid will therefore require further exploration to determine the extent to which categorical programs promote or hinder the objective of school finance equalization. The distribution of state categorical aid will therefore be a critical policy issue - and possibly an issue in school finance litigation - over the next few years.

The issues which will be litigated in the school finance cases of the 1980's are therefore broader in scope and more complex than those which might have been anticipated a decade ago. The Serrano case in California provided an opening wedge for judicial intervention into school finance by narrowly defining equity in terms of fiscal neutrality, but succeeding suits which have greatly

expanded Serrano, raise a wide range of educational issues for the courts to consider. Many of the issues which will be litigated over the next decade, including education of the handicapped, the disadvantaged, and the problems of cities are carryovers from recent cases. Others such as racial discrimination in educational funding and the conflict between regular and special education will be new on the litigation agenda. Thus it is quite likely that the 1980's will be a period of intense judicial activity.

FOOTNOTES

1/ 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971).

2/ 411 U.S. 1 (1973).

3/ The Court, without serious reservation, accepted the assertion of the State of Texas that the Texas school finance statute promoted the objective of local control and thus provided a rational basis for the system, with its vast inequalities.

4/ Thompson v. Engelking, 96 Ida. 793, 437 P.2d 635 (1975), Northshore School District No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974) and Olsen v. Oregon, 276 Or. 9, 554 P.2d 139 (1976).

5/ Serrano v. Priest, No. 938254 (Los Angeles Superior Court, Memorandum Re Intended Decision, April 10, 1974). It was widely assumed that the California Supreme Court's decision in Serrano ended this matter. The court, however, only sustained plaintiffs' complaint against a motion to dismiss, and plaintiffs still had to prove their allegations about wealth discrimination.

6/ Horton v. Meskill, 31 Conn. Supp. 377, 322 A.2d 818 (Hartford County Superior Court 1974).

7/ Serrano v. Priest, 135 Cal. Rptr. 345, 557 P.2d 929 (1976).

8/ 376 A.2d 359 (1977).

9/ Board of Education of the City School District of the City of Cincinnati v. Walter, No. A 7602725 (Hamilton County Court of Common Pleas, Dec. 5, 1977).

10/ Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973).

11/ See Robinson, 351 A.2d 713, 719 and 355 A.2d 129 (1976). The duties of the constitutional mandates were left to the legislature to fill in, since the court found that the state had never spelled out the content of the constitutionally mandated educational opportunity.

12/ Seattle School District No. 1 v. Washington, No. 53950 (Thurston County Superior Court, Jan. 14, 1977).

13/ Board of Education of the City School District of the City of Cincinnati v. Walter, supra, note 9.

14/ Index No. 8208174 (Nassau County Supreme Court).

15/ Bruce Gensemer, "Personal Income Variations Among Ohio School Districts and Their Implication for the Guaranteed Yield Formula", Report to the Education Review Committee, Ohio General Assembly, June 1976. Joel D. Sherman, "An Evaluation of the Current Structure of School Finance in Ohio", School Finance Project, Lawyers' Committee for Civil Rights Under Law, Washington, D.C., March, 1978.

16/ Thomas Wei-Chi Yang and Ramesh Chauldhari, "A Study of the Relationship Between Selected Socioeconomic Variables and Local Tax Effort to Support Public Schools in Illinois", Center for the Study of Educational Finance, Illinois State University, December, 1976.

17/ School Finance Reform in the States, "Education Finance Center, Education Commission of the States, Denver, Colorado, December, 1976.

18/ Joel D. Sherman, "Underfunding of Majority-Black School Districts in South Carolina", School Finance Project, Lawyers' Committee for Civil Rights Under Law, Washington, D.C., October, 1977.

19/ This subject is presently being investigated by the School Finance Project, Lawyers' Committee for Civil Rights Under Law.

20/ William H. Wilken, "State Aid for Special Education - Who Benefits?", National Foundation for the Improvement of Education, Washington, D.C., May, 1976.